MOTION FILED
JAN 6 1978

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-665

UNITED STATES OF AMERICA,

Petitioner,

v.

STEPHEN PITCAIRN, AGENT FOR SHAREHOLDERS OF AUTOGIRO COMPANY OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MOTION OF ELTRA CORPORATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF CERTIORARI AND BRIEF OF ELTRA CORPORATION AS *AMICUS CURIAE*

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MOTION OF ELTRA CORPORATION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF CERTIORARI

Eltra Corporation, by its counsel, respectfully moves this Court for leave to file the accompanying brief in support of the Petition by the United States of America for a Writ of Certiorari to the United States Court of Claims.

The Consent of the United States has been obtained from the Solicitor General, and this Consent has been submitted by the Solicitor General to the Clerk of this

Court. The attorney for the respondent herein has refused to consent to the filing of this brief by Eltra Corporation.

The applicant, Eltra Corporation, has an interest in this case in that, should the judgment of the Court of Claims be upheld, Eltra Corporation will be required by the Government to indemnify it for a portion of that judgment.

Eltra Corporation is concerned with the pernicious effect the decision of the Court below will have on Government-Contractor relations and the probable increased cost to the Government of obtaining items it needs on an indemnified basis. Furthermore, Eltra Corporation is concerned with the effect the decision of the of the Court below will have on the law of compensation in eminent domain cases, particularly where the property taken is a patented invention, and more generally, there is concern with the effect of the decision of the Court below on the law of damages in patent infringement cases.

Eltra Corporation believes its views as advanced in its brief will provide further illumination of the problem generated by the decision of the Court below, especially as to the effect of that decision on those who contract with the Government and of the reasons why this Court should grant Certiorari.

Wherefore, Eltra Corporation respectfully requests this Court to permit it to file the accompanying Brief *Amicus Curiae* in support of the Petition for a Writ of Certiorari by the United States of America.

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OPINIONS BELOW

The opinion of the trial judge of the Court of Claims (App. A, pp. 1a-31a) is not officially reported. The opinion of the Court of Claims (App. B, pp. 32a-108a), as amended on rehearing (App. C, pp. 109a-112a), is reported at 547 F.2d 1106.[1]

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[1] "App." references are to Petitioner's Appendices attached to the Petition.

JURISDICTION

The Court of Claims announced its opinion with respect to the questions presented here on December 15, 1976, and, except for amendments to its original opinion, denied both parties' motions for rehearing on March 4, 1977 (App. C, pp. 109a-112a). The final judgment of the Court of Claims was entered on July 12, 1977 (App. D, pp. 113a-115a). It is understood that by an order dated October 6, 1977, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including November 9, 1977, without prejudice to the Court's consideration of whether the application was timely filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the market value of a license in respondent's patents taken by eminent domain under 28 U.S.C. §1498 should be determined by reference to (a) unaccepted offers made by respondent and (b) optional provisions in a single license agreement between respondent and a helicopter manufacturer which were never allowed to take effect.

2. Whether evidence of royalties actually paid under two license agreements can be ignored because of the existence of the government power to take a license in patents by eminent domain.

STATUTE INVOLVED

28 U.S.C. 1498(a) provides in pertinent part:

> Whenever an invention described in and covered by a patent of the United States is used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, the owner's remedy shall be by action against the United States in the Court of Claims for the recovery of his reasonable and entire compensation for such use and manufacture.
>
> For the purposes of this section, the use or manufacture of an invention described in and covered by a patent of the United States by a contractor, a subcontractor, or any person, firm or corporation for the Government and with the authorization or consent of the Government, shall be construed as use or manufacture for the United States.

INTEREST OF ELTRA CORPORATION

Eltra Corporation is a successor-in-interest to Hiller Helicopters, which during the period in question in this litigation produced some of the helicopters, which are the subject matter of this litigation, and which have been adjudged to infringe one of respondent's patents. The Government contends that in at least some of the contracts for the procurement of these helicopters from Hiller by the Government, Hiller agreed to indemnify the Government against possible patent infringement claims. While the amounts for which ELTRA might be liable are small in comparison to the total judgment against the Government, they are sufficiently large to be of concern to ELTRA. Additionally, as a result of a settlement agreement in *Autogiro Company of America v. ELTRA Corporation*, Civil Action No. 37,351 in the District Court for the Northern District of California, ELTRA has agreed to pay respondent the same rate of compensation for certain commercial helicopters as is finally determined by the Court of Claims in this case. ELTRA is involved in government procurements where indemnification of the Government for

patent infringement might be involved, and will be affected as a result of the pernicious influence this case will have on government-contractor relations. ELTRA, from time to time, is involved in patent litigation and is concerned with the effect this decision might have on the law of damages in such cases in the federal courts.

STATEMENT

This case arises out of an action brought by the respondent in the United States Court of Claims under the provisions of 28 U.S.C. §1498 wherein reasonable compensation is sought for the unauthorized manufacture and/or use by or for the government of respondent's patented inventions. In *Autogiro Company of America v. United States,* 384 F.2d 391, the Court of Claims found that only eleven patents out of thirty-two asserted by respondent at various times during this lengthy litigation were valid and infringed by seven models of helicopters, including Hiller helicopters.[2] It is notable that most of these patents were finally adjudged to be valid, and infringed on the basis that the government had not properly excepted to all of the nearly four hundred findings on validity and infringement made by the Trial Commissioner. 384 F.2d at 401-403, 415. Thus, much of the infringement liability was finally adjudicated in the lower court solely on the basis of a technicality, rather than on the merits.

The petition for a writ of certiorari is, however, not concerned with the adjudication of liability, but with the manner by which the Court below measured the compensation to which respondent is entitled. In order

[2] The Hiller machines were found to have infringed only U.S. Patent No. 1,990,291. (App. B, p. 37a).

to arrive at what it deemed to be an appropriate measure of damages, the Court below utilized a royalty rate which had never been accepted by anyone in the industry other than one manufacturer, who never allowed a provision requiring that royalty rate to be put into effect. Therefore, although the respondent-patentee was found to have had no established royalty rate, which had been accepted by the industry, the Court below allowed a series of unaccepted offers of a given royalty rate to be the measure of damages.

In order to place this case in its proper context, the history of respondent's licensing activities must be understood. Although a principal in respondent's predecessor-in-interest, Harold F. Pitcairn, now deceased, initially engaged in an attempt to develop and manufacture autogiros, and to this end acquired patents and know-how of others, these efforts were soon abandoned in favor of merely selling patent licenses to the rotary wing aircraft industry. (App. B, pp. 34a-35a, FF 466)[3]

Before World War II, Pitcairn, a principal of Autogiro Company of America, caused that company to license himself and one other company, Kellett Autogiro, under certain of the Autogiro-owned patents generally at a royalty rate of 5% of the aircraft retail sale price. Those licenses included provisions permitting the licensee, Pitcairn, to use all of Autogiro's patents and to utilize any Autogiro technical data at cost. When Pitcairn sold his manufacturing facility, the beneficiary of the aforementioned license, his successors-in-interest, first a company called G&A Aviation and later the Firestone Tire

[3] FF refers to Findings of Fact made by the Court of Claims as a part of its December 15, 1976 opinion. It is understood that copies of these have been lodged with the Clerk by Petitioner.

and Rubber Company, retained licenses similar to the one Pitcairn had sold to himself. (App. B, p. 44a, n. 4).

During World War II, Autogiro agreed to a wartime-only license with United Aircraft Corporation, the manufacturer of the Sikorsky helicopter, and the United States Army Air Corps at a royalty rate of 0.85% of the total airframe price exclusive of the cost of the engines. This wartime license was allowed to terminate by its own provisions upon the cessation of hostilities. At that point, respondent's predecessor was without any licensees, and it was then necessary for it to embark upon a new round of negotiations with various helicopter manufacturers. (App. B, p. 45a, n. 5).

The aforementioned negotiations resulted in only *one* license agreement with *one* manufacturer, United (Sikorsky). In January, 1947, United accepted a license requiring payment for the years 1947 and 1948 of a royalty having a ceiling of $500 per aircraft; in January, 1949, this royalty rate was to be increased to two percent (2%) of the retail price of each aircraft sold. This license, however, included a provision by which it could be cancelled by United prior to effective date of the 2% royalty rate. United exercised this option; United refused to allow the 2% royalty provision to become operative. (App. B, pp. 45a-46a).

Following the inception of the agreement with United, Autogiro loudly trumpeted to the industy that it had reached an agreement with United at a 2% royalty rate, and a similar rate was offered to the industry. (App. B, p. 46a). *No* manufacturer agreed to Autogiro's offer; no one thought enough of the Autogiro patent portfolio to agree to such a royalty rate. (App. A, p. 15a; App. B, pp. 46a-48a). Following these refusals in July, 1948, United, under the provisions of its agreement with Autogiro,

timely cancelled the license with Autogiro before the 2% royalty rate was to become effective. (App. B, pp. 48a-49a, n. 11). During further negotiations following the United cancellation, Pitcairn offered to *sell* his *entire* Autogiro patent portfolio to United for the total sum of $750,000. (App. B, p. 95a). United did not think the patent portfolio was worth it and refused. Another round of negotiations ensued at the behest of Autogiro, and following these negotiations United agreed to a paid-up license covering all of the Autogiro patents (over 200 patents) for the total sum of $120,000. The latter represented the additional payment necessary to arrive at a $325,000 paid-up license after taking into consideration royalties previously paid by United in previous years. This is the *only* established royalty before the Court for the post-war years, which the Court held to be the only operative period.

Before the Trial Commissioner in the Court below, the Government's able and experienced expert witness testified as to how "reasonable and entire compensation" should be computed. His computations were based on an extrapolation from the only actual royalty paid by any licensee during the period 1946 through 1949, the royalty for the paid-up license described above. He calculated that respondent was entitled to a royalty compensation of $830,377.22. (App. B, pp. 102a-106a, n. 3). In contrast the Court below finally arrived at an award of damages in the amount of $14,440,772.

The sole stated basis for the Court's award described above is 2% royalty provision in the United license discussed above wherein, commencing in January, 1949, United agreed to pay a royalty of 2% of the airframe price of each aircraft. This measure was used despite the fact that no other manufacturer in the industry agreed to

such a royalty rate and despite the fact that United rejected that royalty rate prior to that provision of its agreement with Autogiro becoming effective.

An otherwise unaccepted and never operative 2% royalty provision in a 1947 license formed the basis for the Court of Claims' determination that the market value of the license for plaintiff's patent portfolio was a 2% royalty rate. (App. B, pp. 52a-53a). The previously agreed upon royalty ceiling of $500 per aircraft, the $120,000 payment for a paid-up license, and Autogiro's offer to sell its entire patent portfolio for a sum of $750,000 were completely ignored by the Court of Claims, because it viewed them as compromises of possible litigation. (App. B, pp. 51a-52a). The latter conclusion, it is to be noted, has no basis in the record, and can only be considered the result of speculation. The Court below concluded that the 2% royalty figure was "highly probative" (App. B, p. 49a) of the value of respondent's patents because "(respondent) proposed similar licenses to other manufacturers of helicopters, in effect announcing its post-war rate to be 2%". (App. B, p. 46a). The Court below overcame the refusal by the entire industry to be bound to respondent by a 2% royalty rate by its finding of a "significant fact * * * that * * * (respondent) made the offer and made it widely". (App. B, p. 46a). The Court below chose to completely ignore and reject the relevance of the *only* licensing transaction which was allowed, because somehow it viewed that agreement as the product of "one-sided litigation pressure" by United upon respondent. (App. B, p. 52a). On the basis of this pure speculation, it ruled that "the 2% rate should be accepted for all infringements". (App. B, p. 51a).[4]

[4]The Court below applied the other provisions of the United agreement for the brief period prior to January 1, 1949. (App. B, pp. 53a-54a, n. 16).

This Court's attention is directed to the dissenting opinion by Judges Kashiwa and Bennett. (App. B, pp. 83a-108a). They would have followed the reasoning of the Government's expert witness and awarded a royalty compensation in the amount stated hereinabove. They, it is believed, correctly analyzed the problem by finding that the marketplace had in fact rejected, in fact totally rejected, respondent's offer of a 2% royalty rate. The only royalty payment arrangement ever accepted by anyone in the marketplace was that discussed hereinabove, i.e., the paid-up license which would have resulted in the award of the lower royalty figure mentioned above.

The Court below chose to ignore the most reliable indicator of an infringed patent's value, the value placed upon it *in actuality* by the marketplace. Instead, on the basis of pure *speculation*, the Court chose to utilize the measure of a 2% royalty rate merely on the basis that respondent had widely offered it to the industry, and on the basis that it otherwise would have been accepted had there not been the alleged, but unproved, one-sided litigation pressure. Thus, the Court below chose to utilize speculation instead of fact in arriving at its measure of damages. In so doing, it conjured up a principle of law which has never before been accepted, and if now accepted, will wreak havoc on the law of compensation in eminent domain cases and on the law of damages in patent cases.

REASONS FOR GRANTING THE WRIT

Should the decision of the Court of Claims in this matter be allowed to stand, it can be reasonably expected that in future situations where a patentee anticipates seeking compensation from the Government under 28 U.S.C. 1498 the following scenario will ensue.

The patentee, aware of Government procurement involving his invention, in anticipation of seeking recovery from the Government, will contact others in his industry requesting that they take a license under his patent at what everyone agrees is an exorbitant royalty rate. Failing to find any takers on the commercial market, the patentee will file suit in the Court of Claims under 28 U.S.C. 1498 seeking "reasonable and entire compensation" for unauthorized use and/or manufacture of his invention by the Government. In pleading his case to the Court of Claims, the patentee will contend that his measure of damages should be the previously mentioned exorbitant royalty rate which had been widely offered, but completely rejected by the industry. The patentee will contend that he is entitled *prima facie* to it because he offered it to everyone in the industry, and that the only reason it was not accepted by the industry was the fact that he could not enjoin Government contractors from using the invention and that he was subjected to "one-sided litigation pressure". Using its previous decision in *Pitcairn v. United States* as precedent, the Court of Claims will then give the patentee as his measure of damages the exorbitant royalty rate which everyone in the industry had refused.

The foregoing is not an unreasonable picture of the result of future litigation in the Court of Claims on the basis of that Court's decision here on appeal. The Court below has opened wide the doors of the Federal Treasury, as well as the pockets of those who will be forced to indemnify the Government under certain conditions. This state of affairs should not be allowed by this Court to continue. The Government and its Contractors are entitled to the due process of law; the patentee must be required to offer greater proof of the value of his patent property than his own bold assertions.

THIS DECISION IS IN CONFLICT WITH A SUBSTANTIALLY CONTEMPORANEOUS DECISION BY THE SAME COURT

The decision here in question is in conflict with a substantially contemporaneous decision by the same Court on the question of the measure of damages where there was also found to be no established licensing program or established royalty. This state of affairs renders impossible for those who contract with the Government on an indemnity basis to determine what their potential liability might be in circumstances such as those here in question. Furthermore, two decisions of the Court below indicate that there is irreconcilable conflict in that Court as to a proper measure of damages in such circumstances, and therefore, that Court requires instruction by a higher authority.

In *Tektronix v. United States,* 552 F.2d 343, for example, the Court of Claims concluded that Tektronix had no established licensing program. It, therefore, concluded that there was no established royalty, and therefore, that which is the best measure of damages was not available as a measure of reasonable and entire compensation. It was then concluded that a reasonable royalty must be granted, and alternative methods were employed. The alternative method employed by the Court of Claims was the widely accepted willing buyer/willing seller concept which is best elucidated in *Georgia Pacific Corporation v. U.S. Plywood-Champion Papers Inc.,* 446 F.2d 295, *cert. denied,* 404 U.S. 970.

Under the foregoing concept the Court, utilizing figures produced by the accused infringer as to its profit picture and figures produced by the patentee as to its financial position, arrives at what it believes would be a royalty

figure agreeable to both parties, i.e., "a reasonable royalty". While admittedly this is an artifice, it has been proven to be a well accepted and workable method of arriving at suitable damages where there are no other historical facts tending to prove what the damages should be.

In effect the Court below in the case at bar found that there was no established licensing program, and no established royalty. As will be discussed, this Conclusion is open to question. Instead of using its own precedent in the *Tektronix* case, the Court relied on the pure speculation that there was one-sided litigation pressure or that the industry felt that it did not need to take a license because of the eminent domain taking by the Government, which considerations are not shown to be present by the evidence, and it was then speculated that had not these factors been present the industry would have accepted the respondent's widely offered 2% royalty rate.

Furthermore, the Court ignored or refused to adhere to, but did not specifically overturn, its previous decisions that the best possible measure for reasonable and entire compensation is an established royalty rate. *Carley Life Float Co. v. United States,* 74 Ct.Cl. 682. In the case here on appeal there was in fact an established royalty rate on the basis of the paid-up license with United, mentioned above. This clear indicator as to the value of the Autogiro patents was ignored as was the long line of Court of Claims decisions which utilize this indicator as the best evidence of the value of the property in question.

THIS DECISION IS IN CONFLICT WITH THE LAW OF DAMAGES IN PATENT CASES IN ALL FEDERAL CIRCUITS

In determining what constitutes "reasonable and entire compensation" under 28 U.S.C. 1498 inevitably the the law of damages in patent cases is considered. Conversely, because of the relatively large number of patent cases adjudicated by the Court of Claims under 28 U.S.C. 1498 the Federal Courts tend to utilize the decisions of this court as persuasive authority pointing to its expertise in patent cases by reason of the number of cases handled. The decision here in question, therefore, will become an important part of the law of damages in patent cases.

The precedent the decision below establishes is that in the absence of an established royalty a reasonable royalty can be established by proof of unaccepted offers. No Federal Circuit has been found to have accepted this principle. However, to have this principle become law in a court of such significance to the law of patents, at a minimum, produces an ambiguity considerably clouding what has heretofore been a proven and workable principle. At worst, it will be utilized as still another method by which a reasonable royalty can be determined in patent cases, considerably lowering the previously high standards of proof in this area to the point where essentially unproven assertions of value will suffice.

This conflict should be removed by removing the principle of law enunciated by the Court below.

THE CONCEPT OF "REASONABLE AND ENTIRE COMPENSATION" IN 28 U.S.C. 1498 REQUIRES FURTHER INTERPRETATION

In its decision here in question the Court below has accepted the principle that where one is seeking compensation for an eminent domain taking by the Government and where the property owner has widely offered that property for sale at a given rate, in the absence of a specific value placed on the property in the marketplace, the aforementioned offers have *prima facie* title to acceptance as the measure of compensation to which the property owner is entitled. More specifically in the case at hand, the Court below found that simply because the 2% royalty rate was widely offered to the industry, that offer has *prima facie* title to acceptance as the reasonable royalty for the period in question for use of the respondent's patents by the petitioner.

Acceptance of this principle in this case presupposes acceptance of (1) a provision in a single agreement which the parties never allowed to become effective and (2) offers made to at least three other major firms in the industry which were summarily rejected by those firms. Thus, the Court accepted principles which fly in the face of accepted principles of law in establishing compensation in eminent domain cases. *Sharp v. United States,* 191 U.S. 341, 348-349; *United States v. Dillman,* 146 F.2d 572, 575, cert. denied, 325 U.S. 870. Evidence of unaccepted offers, or for that matter, similar transactions which have not been accepted in the marketplace by an actual sale or exchange, are considered to be unreliable, and evidence of such indicia have been held to be inadmissible, even in previous decisions of the Court below. *Sharp v. United States, supra.*

As a result of this decision, the Court below will have established precedent that admissible evidence of the value of property taken in eminent domain proceedings can be the property owner's own view of the value of his property, and when he publicizes those views in the form of offers to other interested parties, those offers are *prima facie* entitled to acceptance by the Court. This has the effect of turning eminent domain proceedings into a forum for the property owner where he merely announces the value of his property and the Court acquiesces in the absence of at least a preponderance of evidence to the contrary. Essentially the Government will be forced to prove what the value of the taken property is not.

As indicated by the hypothetical scenario set forth hereinabove, the reasoning by the Court of Claims in this decision will have a wide and damaging impact on similar such cases which undoubtedly will arise in the future. The Court has established that unaccepted offers may be admitted into evidence in such cases, contrary to the normal rule, and they must be accepted as *prima facie* evidence of value. This decision thus seriously clouds the interpretation heretofore given "reasonable and entire compensation" to the point where this phrase can be interpreted to mean that the taken property's value for which its owner must be compensated is essentially that which the property owner says it is, even though the market does not agree. To allow this decision to go unreviewed and unreversed will do great mischief to eminent domain cases, and particularly those cases arising under 28 U.S.C. 1498.

In determining what is "reasonable and entire compensation" the Court below, on the basis of the decision here in question, would have us believe that once compensation is determined, it must be elevated by some

order of magnitude to compensate for the fact that where the Government is the dominant customer for the property in question, the matter will have been depressed and the value of the property depreciated. This simply is not the law and likewise would do great mischief to eminent domain proceedings in the future. It is only where this factor can be shown to be a "direct and identifiable element of depreciation" that it can be given consideration. *Winn v. United States,* 272 F.2d 282; *Boyd v. United States,* 222 F.2d 493, 495. No such direct relationship is present in this case, and there is no evidentiary support for the speculation by the Court below that such depreciation had occurred.

The decision of the Court below has changed the interpretation of "reasonable and entire compensation" to include evaluation of the possibility, in this case based on mere speculation, that some depreciation of the property in question has occurred by virtue of the fact that the Government is present in the marketplace and that the compensation must be elevated accordingly. Quite clearly, such an interpretation will escalate the costs of Government procurement and the values of judgments against the Government in the Court of Claims well beyond their true values.

It is submitted that the Court must review this decision to prevent the great damage which will occur to Government/Contractor relationships if the decision is allowed to become law. It is to be remembered that while the Government will often assume the entire liability for patent infringement by its contractors, there are numerous circumstances where the Government requires contractors to indemnify it for any possible infringement liability. The Government's general policy is that when it is buying commercially available goods, the Government is entitled to be indemnified as a private party would be under the Uniform Commercial Code. See *Carrier Corp. v. United States,* 534 F.2d 250. Therefore, over and above the effect on the Federal Treasury described above, this decision will create great uncertainty with respect to the financial positions of numerous existing Government contractors in pending and future cases. It is quite likely that potential contractors will be unable to properly evaluate potential costs under Government contracts, and this uncertainty will undoubtedly have the effect that they will simply not bid where indemnification is involved, or will consider doing so only at an elevated price. In the alternative, the Government will often be forced to bear infringement liability where it would ordinarily not be necessary. The net result can only be a much greater expense to the Government for commercial goods, and this potential impact alone would appear to be sufficient to require review of the decision in question by this Court.

The decision by the Court below is so clearly erroneous and so susceptible to misuse by condemnee litigants in all types of eminent domain cases that action to correct this error is necessary.

CONCLUSION

For the reasons advanced hereinabove Eltra Corporation urges that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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